

## **APPENDIX 1 – AUTHORITY AND CONFIDENTIALITY**

### **What is EPA's authority to ask these questions?**

Section 3007 of the Resource Conservation and Recovery Act (RCRA) of 1976, as amended (Title 42 of the United States Code, Section 6927) provides EPA with the authority to obtain information. "For the purposes of developing or assisting in the development of any regulation," and upon request by a duly designated EPA officer, Section 3007 authorizes an EPA employee to inspect or copy records relating to waste that EPA has reason to believe may be hazardous. Section 3007 requires generators, storers, treaters, and disposers of these wastes to furnish information about the wastes, upon request of the duly designated EPA officer.

Section 308(a) of the Clean Water Act (CWA), as amended (Title 33 of the United States Code, Section 1318) provides EPA with authority to obtain information "[w]henever required to carry out the objective of this Act, including...(2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance..." In such cases the Administrator of EPA "shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports...and (v) provide such other information as [the Administrator] may reasonably require..."

### **What if I don't want my competitors to know what my answers are?**

You may not withhold information from the Administrator or her authorized representative. If you want EPA to treat one or more of your answers as confidential business information (CBI), you must claim it as confidential when you submit it to EPA. If you don't claim confidentiality when you provide your answers to EPA, we may make the information available to the public without giving you notice first.

### **How do I submit my answers as CBI?**

The easiest way to claim your answers as CBI is to mark the check-off boxes provided in this questionnaire. Another way is to include a letter with your questionnaire, and mention in the letter each and every questionnaire answer that you are claiming as CBI. When you return your questionnaire, place it in an envelope addressed to Regina Magbie at EPA, and write on the envelope "RCRA Confidential Business Information - To Be Opened by Addressee Only". Then place that envelope in a second, outer envelope addressed to Regina Magbie, but DO NOT WRITE ANYTHING ABOUT RCRA CBI on the outside of the outer envelope. The complete address is: Regina Magbie, Mail Code 5305W, Office of Solid Waste, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460. Send the questionnaire by registered mail, return receipt requested.

**If I claim that my answers are confidential, what will EPA do to keep them confidential?**

EPA employees who handle confidential business information (CBI) must have training in the procedures for handling it, and they understand that there are penalties for wrongful disclosure (fines up to \$1,000, prison for 1 year and removal from office). If EPA transfers CBI to EPA contractors for processing or analysis, EPA publishes a notice in the Federal Register announcing the transfer, and you have a chance to give EPA comments (for example, if you object to a particular contractor having access to your answers). EPA also writes clauses into the contract that require the contractor to respect the confidentiality of the CBI. The EPA contractor's employees have training in the procedures for handling CBI, and they also understand that there are penalties for wrongful disclosure (fines up to \$5,000 or prison for 1 year). If your business is affected by wrongful disclosure of CBI, you may enforce the clauses in the contract that require EPA's contractor to handle the information as CBI. To verify that EPA has placed the required confidentiality clauses in the contract between EPA and the contractor which has access to the information being collected in this survey, contact Becky Cuthbertson of EPA at (703)308-8447 or [cuthbertson.becky@epamail.epa.gov](mailto:cuthbertson.becky@epamail.epa.gov). Federal law (Title 18 of the US Code, Section 1905, and Title 42 of the US Code, Section 6927) and EPA regulations (40 CFR Part 2) set the limits on disclosing CBI, and set the penalties and legal remedies for wrongful disclosure.

**Can EPA reveal my information even if I have claimed it as CBI?**

The general rule is that EPA must treat as confidential all information you claim as CBI. However, there are three ways EPA might reveal the information you claim as CBI:

- 1) a court may order disclosure
- 2) Congress may request the information, or
- 3) EPA may determine that the information you have claimed as CBI is not entitled to protection as CBI.

**What if EPA decides my answers are not entitled to protection as CBI?**

If a member of the public requests your answers that you have claimed as CBI, or if EPA does not believe the answers you claimed as CBI are entitled to protection as CBI, EPA will send you a letter and ask you to defend your claim (in other words, EPA will ask you to give specific reasons why you think your answers should be protected as CBI). If you don't defend your claim, EPA may go ahead and disclose the information. If you do defend your claim, and if EPA's Office of General Counsel agrees with your defense, then EPA will continue to protect as CBI the answers that you gave and that you claimed are CBI. If you do defend your claim, but EPA's Office of General Counsel disagrees with your defense, then EPA will send you another letter to let you know that your answers are not entitled to CBI protection. At that point, you can challenge EPA's decision in court.

### **What if I sent my CBI directly to EPA's contractor instead of Regina Magbie?**

If you sent your questionnaire answers directly to EPA's contractor, and you claimed them as CBI when you sent them, the contractor must handle the information as CBI in the same way as if you had sent the information to Regina Magbie, and then EPA had transferred the information to the contractor. You have the same right to enforce the contract clauses that require the contractor to handle the information as CBI. If you sent your questionnaire answers directly to EPA's contractor, but you did not claim them as CBI when you sent them, EPA is not required to protect them as CBI.

### **Where are the regulations for EPA's CBI procedures?**

EPA regulations for handling confidential business information are in 40 CFR Part 2, Subpart B.<sup>1</sup> 40 CFR Section 2.203(b) describes how a business should make a business confidentiality claim. 40 CFR Part 2, Subpart B describes the procedures EPA will use to treat information covered by such a claim.

### **What are the clauses in the contract that require EPA's contractor to handle the information as CBI?**

The Federal Acquisition Regulations at 48 CFR 1558.235 require EPA to insert two clauses into all contracts where EPA contractors have access to CBI: "Screening business information for claims of confidentiality" and "Treatment of confidential business information." Here is the text of these two clauses:

1552.235-70

#### *Screening Business Information for Claims of Confidentiality (Apr 1984)*

(a) Whenever collecting information under this contract, the Contractor agrees to comply with the following requirements:

(1) If the Contractor collects information from public sources, such as books, reports, journals, periodicals, public records, or other

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<sup>1</sup> To read these regulations, view them on the Internet at <http://www.access.gpo.gov/nara/cfr/index.html> (scroll down to "Search or browse your choice of CFR titles and/or volumes," on the next screen scroll down to Title 40, click right on the October 1, 1997 date to place a check in the box; scroll down to the button marked "Continue" and click on it; on the next screen click the box beside Title 40 to remove the check mark, then place a check in the next column under Volume , scroll up to the Search Terms and type in quotation marks "2," then click on the button marked "Submit."). If you do not have access to the Internet, you can look them up at many libraries, or call 1-703-308-8447 for a facsimile copy.

sources that are available to the public without restriction, the Contractor shall submit a list of these sources to the appropriate program office at the time the information is initially submitted to EPA. The Contractor shall identify the information according to source.

(2) If the Contractor collects information from a State or local Government or from a Federal agency, the Contractor shall submit a list of these sources to the appropriate program office at the time the information is initially submitted to EPA. The Contractor shall identify the information according to source.

(3) If the Contractor collects information directly from a business or from a source that represents a business or businesses, such as a trade association:

(i) Before asking for the information, the Contractor shall identify itself, explain that it is performing contractual work for the U.S. Environmental Protection Agency, identify the information that it is seeking to collect, explain what will be done with the information, and give the following notice:

(A) You may, if you desire, assert a business confidentiality claim covering part or all of the information. If you do assert a claim, the information will be disclosed by EPA only to the extent, and by means of the procedures, set forth in 40 CFR part 2, subpart B.

(B) If no such claim is made at the time this information is received by the Contractor, it may be made available to the public by the Environmental Protection Agency without further notice to you.

(C) The contractor shall, in accordance with FAR part 9, execute a written agreement regarding the limitations of the use of this information and forward a copy of the agreement to the Contracting Officer.

(ii) Upon receiving the information, the Contractor shall make a written notation that the notice set out above was given to the source, by whom, in what form, and on what date.

(iii) At the time the Contractor initially submits the information to the appropriate program office, the Contractor shall submit a list of these sources, identify the information according to source, and indicate whether the source made any confidentiality claim and the nature and extent of the claim.

(b) The Contractor shall keep all information collected from nonpublic sources confidential in accordance with the clause in this contract entitled "Treatment of Confidential Business Information" as if it had been furnished to the Contractor by EPA.

(c) The Contractor agrees to obtain the written consent of the Contracting Officer, after a written determination by the appropriate

program office, prior to entering into any subcontract that will require the subcontractor to collect information. The Contractor agrees to include this clause, including this paragraph (c), and the clause entitled "Treatment of Confidential Business Information" in all subcontracts awarded pursuant to this contract that require the subcontractor collect information.

(End of clause)

1552.235-71

Treatment of confidential business information (Apr 1984)

(a) The Contracting Officer, after a written determination by the appropriate program office, may disclose confidential business information to the Contractor necessary to carry out the work required under this contract. The Contractor agrees to use the confidential information only under the following conditions:

(1) The Contractor and Contractor's Employees shall: (i) use the confidential information only for the purposes of carrying out the work required by the contract; (ii) not disclose the information to anyone other than EPA employees without the prior written approval of the Assistant General Counsel for Contracts and Information Law; and (iii) return to the Contracting Officer all copies of the information, and any abstracts or excerpts therefrom, upon request by the Contracting Officer, whenever the information is no longer required by the Contractor for the performance of the work required by the contract, or upon completion of the contract.

(2) The Contractor shall obtain a written agreement to honor the above limitations from each of the Contractor's employees who will have access to the information before the employee is allowed access.

(3) The Contractor agrees that these contract conditions concerning the use and disclosure of confidential information are included for the benefit of, and shall be enforceable by, both EPA and any affected business having a proprietary interest in the information.

(4) The Contractor shall not use any confidential information supplied by EPA or obtained during performance hereunder to compete with any business to which the confidential information relates.

(b) The Contractor agrees to obtain the written consent of the Contracting Officer, after a written determination by the appropriate program office, prior to entering into any subcontract that will involve the disclosure of confidential business information by the Contractor to the subcontractor. The Contractor agrees to include this clause,

December 18, 1998 DRAFT

1-6

OMB Control Number \_\_\_\_ - \_\_\_\_

including this paragraph (b), in all subcontracts awarded, pursuant to this contract, that require the furnishing of confidential business information to the subcontractor.

(End of clause)